STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 6, 2011
v	No. 294042 Jackson Circuit Court
JEFFERY RICHARD JONES, Defendant-Appellant.	LC No. 08-005775-FH

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of 50 or more but less than 450 grams of a controlled substance (methadone and oxycodone), MCL 333.7403(2)(a)(*iii*), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). He was sentenced as a fourth habitual offender to 120 to 270 months in prison for the controlled substance conviction and to 120 to 180 months in prison for the marijuana conviction. Defendant appeals as of right. We reverse and remand for further proceedings.

After receiving a tip, officers proceeded to a home where defendant lived with Lonnie Webb to "knock and talk." They smelled marijuana. Defendant admitted that he and David Rowley, who did not live at the residence, had been smoking marijuana and that Rowley was flushing marijuana down the toilet. They were detained and a wad of cash, small digital scale, and cell phone were found on defendant's person.

During the execution of a subsequent search warrant, officers found a marijuana bud in the bathroom, a trap door that led to the basement, and a small safe in a crawl space. The safe contained about a pound of marijuana in two Ziploc bags and more Ziploc baggies containing pills. Specifically, it contained 368 Diazepam pills; two quantities totaling 112 oxycodone pills; 137 methadone pills; 103 dihydrocodeine pills; and 108 Adderall pills. There were also 42 unidentified pills, which were apparently found elsewhere in the residence. The first quantity of oxycodone weighed 15.59 grams, whereas the second quantity weighed 15.80 grams, for a total of 31.49 grams. The methadone weighed 39.44 grams. The total for all three quantities was 70.83 grams.

Defendant first argues that the quantities of oxycodone and methadone were improperly aggregated. He maintains that he should have been charged with possession of 25 or more but less than 50 grams of a mixture containing oxycodone and possession of 25 or more but less than

50 grams of a mixture containing methadone, rather than possession of 50 or more but less than 450 grams of the combined controlled substances. We agree.

The determination of this issue requires interpretation of MCL 333.7403. This Court reviews statutory interpretation questions de novo. *People v Plunkett*, 485 Mich 50, 58; 780 NW2d 280 (2010). "When interpreting a statute, courts must "'ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.'" This requires courts to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Plunkett*, 485 Mich at 58 (citations omitted).

MCL 333.7403 provides in pertinent part:

> (1) A person shall not knowingly or intentionally possess a controlled substance . . . unless the controlled substance . . . was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(*iv*), and:
>
> * * *
>
> (iii) Which is in an amount of 50 grams or more, but less than 450 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $250,000.00, or both.
>
> (iv) Which is in an amount of 25 grams or more, but less than 50 grams of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $25,000.00, or both.

Both oxycodone and methadone are controlled substances that are included in schedule 2. See MCL 333.7214. Oxycodone is included in MCL 333.7214(a)(*i*), whereas methadone is separately listed in MCL 333.7412(b).

In *People v Green*, 196 Mich App 593; 493 NW2d 478 (1992), the defendant was convicted under MCL 333.7403(2)(a)(*v*) of separate charges of possession of less than twenty-five grams of cocaine and possession of less than twenty-five grams of heroin. The charges involved trace amounts of the two drugs and arose out of the same transaction. The defendant argued that he was twice placed in jeopardy by the separate charges. This Court disagreed, holding:

> It is clear from the language employed in § 7403 that the Legislature intended the imposition of criminal liability to turn on the consideration of two separate

> factors. The first factor is the amount of a controlled substance possessed, as evidenced by the punishment provisions that authorize the imposition of increasingly severe punishments as the amount of controlled substance possessed increases. . . . The second factor is the type of controlled substance possessed. . . . [T]he present statutory provisions consistently refer to the contraband in a singular form: "a controlled substance," "the controlled substance," "a narcotic drug," "that controlled substance." Additionally, the Legislature's use of the phrase "any mixture containing that controlled substance" suggests to us that *the Legislature intended that punishment be imposed on the basis of the amount of a specific controlled substance possessed, with the implication being that possession of different types of controlled substances warrants punishment for each particular controlled substance possessed*. [196 Mich App at 595-596 (emphasis added).]

The prosecutor argues that defendant was properly charged with possession of 50 or more but less than 450 grams of a controlled substance because both substances were opiate derivatives found in the same place. However, defendant was not charged with possession of opiate derivatives. He was charged with possession of two substances that are listed in separate provisions of MCL 333.7214(a)(*i*). The controlled substances at issue were not the same controlled substance. Significantly, the prosecutor would not have been precluded from bringing separate charges based on the distinction between the two substances. Separate charges would not have violated double jeopardy. Moreover, according to the legislative intent as expressed in *Green,* separate charges based on the amount of the specific controlled substance were contemplated. Thus, defendant should have been charged with one count of possessing 25 to 50 grams of oxycodone and one count of possessing 25 to 50 grams of methadone.

The jury necessarily concluded that defendant possessed at least 50 grams of the combined substances, meaning that the jury concluded he possessed both. Since the proofs established that the individual quantities were more than 25 but less than 50 grams, this case must be remanded for entry of a corresponding judgment of conviction.

Defendant must be resentenced in accord with his convictions on the two lesser charges. He asserts that he should also be resentenced for the marijuana conviction. This request is made in his brief on appeal but he did not raise the issue at sentencing, in a proper motion for resentencing, or in a separate motion to remand filed in this Court. See MCL 769.34(1). However, in *People v Jackson*, 487 Mich 783; 790 NW2d 340 (2010), the Court held that a proper motion could be made in the brief on appeal where, as here, the entitlement to a remand turns on resolution of an appellate issue.

In *Jackson,* the Court held that, based on the language in MCL 769.34(10),

> the Court shall not remand for resentencing *unless* there was either an error in scoring [that changes the guideline results] or defendant's sentence was based on inaccurate information. Conversely, this means that the Court is required to remand whenever one of these two circumstances is present. Thus, the Court may not ignore the two criteria for when a case should be remanded merely because the sentence is within the appropriate guidelines range. When the defendant's

> sentence is based on an *error in scoring* or *based on inaccurate information*, a remand for resentencing is required. [Slip op at 10-11 (footnotes omitted; emphasis in original).]

MCL 771.14(2)(e)(*iii*) requires that a presentence report must include a "computation that determines the recommended minimum sentence range for the crime having the highest crime class." Based on this statute, the sentencing guidelines were scored for defendant's possession of oxycodone and methadone conviction, which, given the quantity involved, was a Class B offense. See MCL 777.13m; MCL 333.7401(2)(a)(*iii*). Once the judgment is modified to reflect possession of the lesser amounts, these will be Class G felonies. See MCL 333.7403(2)(a)(*iv*); MCL 777.13m. However, defendant's marijuana conviction, which was based on MCL 333.7401(2)(d)(*iii*), would be a Class F offense. See MCL 777.13m.

Defendant's minimum sentence of 120 months for the marijuana conviction would be outside a properly scored guidelines range. The highest score possible for a Class F offense is 17 to 30 months. See MCL 777.67. However, for a fourth habitual offender, the maximum is to be increased 100 percent. See MCL 777.21(3)(c). Thus, the applicable range for defendant's minimum sentence on the marijuana conviction would be 17 to 60 months. Defendant is therefore entitled to resentencing on the marijuana conviction.

Defendant next argues that evidence of the dihydrocodeine, Adderall, Diazepam and the unidentified substance should not have been admitted because he was not charged with possession of these substances. However, defendant affirmatively stated that he did not object when these substances were admitted into evidence. At the time of admission, Diazepam and Adderall were referred to by name. Defendant objected to the relevance of the dihydrocodeine, Adderall, Diazepam, given that he was not charged with possession of these substances, when a forensic scientist with the Michigan State Police was called upon to identify the substances. He now maintains that their admission violated MRE 404(b). Since defendant waived objection to the admission of the substances, he may not raise their admission as an error on appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), quoting *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). We note that the significance of the admission of these substances was the sheer number of pills. The names of the drugs were of little consequence. Accordingly, there was no prejudice resulting from the subsequent identification of these drugs.

Finally, defendant argues that it was error to give an aiding and abetting instruction. To the extent a jury instruction involves an issue of law, review is de novo. However, a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Defendant argues that the theory of the prosecution's case had been direct possession. However, the defense was the implication that someone else possessed the substances found in the safe. Positing that allowing Rowley to store drugs at the home would be aiding and abetting his possession, the trial court concluded that the prosecution was entitled to the instruction.

An aiding and abetting instruction is proper where there is evidence that "(1) more than one person was involved in the commission of the crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Head*, 211 Mich

App 205, 211; 535 NW2d 563 (1995). In *Head*, the Court concluded that there was sufficient evidence to establish constructive possession of drugs where the defendant admitted living at the home, was lying on the bed in a bedroom where the drugs were in plain view with the defendant's wallet nearby, and the bedroom contained men's clothing. The defense was that the drugs belonged to another. This Court also found that an aiding and abetting instruction was proper, stating:

> Defendant's theory of the case was that the drugs belonged to his girlfriend or another party. The prosecutor requested an instruction on the theory that, even if the drugs and paraphernalia belonged to someone else, defendant assisted that person by providing a storage place for them. We find no error in the judge's decision to instruct the jury on this issue. The evidence presented at trial required the judge to give the aiding and abetting instruction. [211 Mich App at 211-212.]

Defendant attempts to distinguish *Head* by asserting that, unlike here, the prosecution claimed the defendant was providing the house for the storage of another person's drugs. However, it appears that the primary argument in *Head* was that the defendant directly or constructively possessed the drugs. Like here, the prosecutor's backup position, in the face of a defense that another was responsible, was that the defendant aided and abetted another's possession. There is no meaningful distinction between *Head* and the instant case.

Reversed and remanded for entry of a judgment and resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Donald S. Owens